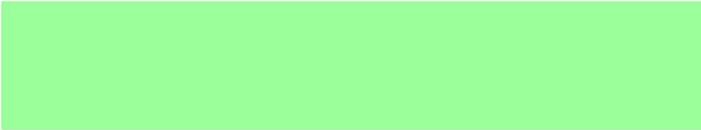




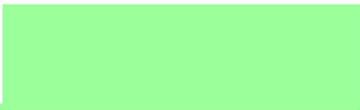
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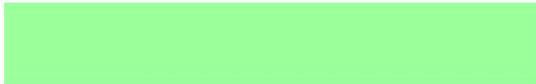


DATE: **MAR 31 2014**

Office: VERMONT SERVICE CENTER

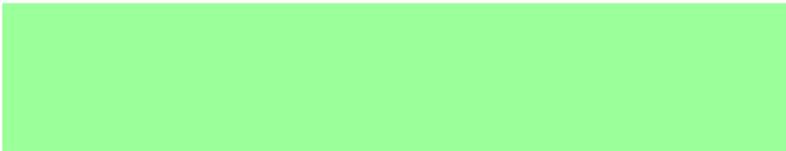


IN RE: Applicant:



APPLICATION: Application for Temporary Protected Status under Section 244 of the Immigration and Nationality Act, 8 U.S.C. § 1254a

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron M. Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The application for Temporary Protected Status was denied by the Acting Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of El Salvador who is seeking Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

The Acting Director (the director) denied the application for TPS because it was determined that the applicant was an alien described in section 208(b)(2)(A)(1) of the Act. The director noted that there were unresolved inconsistencies in the applicant's testimony regarding his military service in El Salvador, and that the applicant had failed to demonstrate that he did not participate in or was unaware of the persecution of others during his military service.

On appeal, counsel contends that the TPS application must be approved as the director did not determine the applicant committed any human rights violation under the Act.

The issue on appeal is whether the evidence in this case is sufficient to require the applicant who is seeking Temporary Protected Status under section 244 of the Act to bear the burden of proving that he did not engage in persecution in El Salvador, his home country, between 1982 and 1990. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The persecutor bar applies to individuals who "ordered, incited, assisted, or otherwise participated in the persecution of others." *See* INA § 208(b)(2)(A)(i); 8 C.F.R. § 208.13(c). Therefore, for the persecutor bar to apply, the record has to establish that the applicant "ordered, incited, assisted, or otherwise participated in the persecution of others." In *Matter of A-H-*, 231 I&N Dec. 774 (A.G. 2005), the Attorney General provided interpretive tools for construing the series of verbs in the persecutor bar and summarized principles identified in existing precedent:

To 'incite' means 'to move to a course of action: stir up: spur on: urge on' or 'to bring into being: induce to exist or occur.' *Webster's Third New International Dictionary of the English Language Unabridged* 1142 (2002). To 'assist' means 'to give support or aid: help.' *Id.* At 132. And to 'participate' means 'to take part in something (as an enterprise or activity) usu. in common with others.' *Id.* At 1646. Case law teaches that (1) these terms are to be given broad application, *see, e.g. Kulle v. INS*, 825 F.2d 1188, 1193 (7<sup>th</sup> Cir. 1987); (2) they do not require direct personal involvement in the acts of persecution, *See, e.g. Ofosu v. McElroy*, 98 F.3d 694, 701 (2<sup>nd</sup> Cir. 1996); (3) it is highly relevant whether the alien served in a leadership role in the particular organization, *See, e.g. Kalejs v. INS*, 10 F.3d 441, 444 (7<sup>th</sup> Cir. 1993); and (4) in certain circumstances statements of encouragement alone can suffice, *See, e.g. United States v. Koreh*, 59 F.3d 431, 440 (3d Cir. 1995). It is appropriate to look at the totality of the relevant conduct in determining whether the bar to eligibility applies. *See e.g. Hernandez v. Reno*, 258 F. 3d 806, 814 (8<sup>th</sup> Cir. 2001).

231 I&N Dec. 774, 784-85(A.G. 2005) (footnotes omitted).

Therefore, to determine whether an applicant “assisted or otherwise participated in” persecution, the adjudicator has to make an affirmative determination of whether “the [applicant’s] acts further the persecution, or were they tangential to it” *Miranda-Alvarado v. Gonzales*, 449 F.3d 915, 928 (9<sup>th</sup> Cir. 2006). The U.S. Supreme Court case of *Federenko v. United States*, 449 U.S. 490 (1981) provided guidance in interpreting the persecutor bar cases. Following the *Federenko* decision, lower courts have expanded the persecutor bar so that personal involvement in killing or torture is no longer necessary for a finding that an alien assisted in persecution. For example, the second circuit court of appeals held that “[P]ersonal involvement in killing or torture *is not necessary* to impose responsibility for assisting or participating in persecution. *Ofusu v. McElroy*, 98 F.3d, 694, 701 (2<sup>nd</sup> Cir. 1996) (emphasis added). The seventh circuit found that the atrocities committed by a unit may be attributed to the individual based on his membership and apparent participation. *Kalejs v. INS*, 10 F.3d 441, 444 (7<sup>th</sup> Cir. 1993), cert. denied, 510 U.S. 1196 (1994). But the Board of Immigration Appeals (BIA) held that mere membership in a persecutory organization does not qualify a person as a persecutor unless the person’s action or inaction furthered the persecution in some way. The BIA instructed the court not to look at the subjective intent of the alien, but at the “objective effects of the alien’s actions.” *Matter of Rodriquez-Marjano*, 19 I&N Dec. 811, 815 (BIA 1988). Therefore, it is the objective effect of an alien’s action that is controlling. *Matter of Rodriquez-Marjano*, 19 I&N Dec. 811, 815 (BIA 1988).

The BIA also held in *Matter of Rodriquez-Marjano*, 19 I&N Dec. 811, 815 (BIA 1988), that some acts directly related to civil war are not persecution. For example,

harm which may result incidentally from behavior directed at another goal, the overthrow of a government or, alternatively, the defense of that government against an opponent, is not persecution. In analyzing a claim of persecution in the context of a civil war, one must examine the motivation of the group threatening harm.

*Id* at 815.

The BIA indicated, however, that some acts, if completed on account of one of the five grounds, could be persecution, even in wartime. *Id* at 816.

The record provides the following facts and procedural history. The applicant filed a Form I-589, Application for Asylum and Withholding of Deportation, on June 12, 1995.<sup>1</sup> He was interviewed regarding the asylum application on June 19, 2003 and again on February 13, 2008. A Notice of Intent to Deny (NOID) the asylum application was issued to the applicant on

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<sup>1</sup> The record also includes a Form I-589, filed in 1981. The Form I-589 includes information that appears to relate to the applicant, such as the name of his wife, but includes a slightly different date of birth, May 18, 1946 not May 8, 1946 and a different A number [REDACTED]. The 1981 Form I-589 was denied and the applicant was placed in immigration proceedings on or around April 13, 1981.

February 27, 2008. A rebuttal to the NOID dated March 6, 2008 is also in the file. The record also includes the applicant's December 27, 1999 Form I-881, Application for Suspension of Deportation or Special Rule Cancellation of Removal (pursuant to section 203 of Public Law 105-100 (NACARA)). The applicant was again interviewed on October 6, 2008. On April 29, 2008, the applicant was notified that his NACARA application had been referred to an Immigration Judge for a decision. On June 24, 2008, the Immigration Judge terminated removal proceedings so that United States Citizenship and Immigration Services (USCIS) could consider the applicant's Form I-485 application filed for permanent resident status under section 245(i), based on an approved Form I-130 visa petition filed by the applicant's brother. On July 21, 2009, the field office director denied the Form I-485, as a matter of discretion, after considering positive and negative factors regarding the applicant's history in El Salvador and the United States. The field office director certified her decision to the AAO for review.

USCIS records show that the applicant entered the United States on August 8, 1977 and was deported on August 16, 1977; entered the United States on January 25, 1978 and was deported on September 26, 1978; entered the United States on March 13, 1980, filed a Form I-589, and was deported on September 25, 1982; and entered the United States again on January 21, 1990.

In the AAO's May 5, 2010 decision affirming the field office director's denial of the Form I-485, dated February 21, 2009, the AAO noted that the field office director found the applicant's statements in his Form I-589 June 19, 2003 interview regarding the involvement of his army patrol in battles with guerillas were not credible and that the applicant's lack of credibility is such a significant negative factor that the applicant is precluded from adjusting his status.

The record reflects that on the 1995 Form I-589, the applicant indicated that he was an official commander in the Salvadoran Army since June 1989 and that his army patrol fought many times with the guerrilla rebel groups. At his June 19, 2003 interview with an asylum officer, he indicated that this statement on the Form I-589 was untrue and that he had been told by the preparer to write down this information as it was good to say that he fought against the guerrillas. In a contemporaneous write-up of that interview also dated June 19, 2003, the asylum officer noted that the applicant had made the following statements: that he was first commander for the second unit in the village of Las Cruces; that he received training in how to recruit people into the military; that he was trained and stationed in the area of Las Cruces, [sic] [REDACTED] and that his commanding officer was Commander [REDACTED] from the city of [REDACTED]; and that the applicant had 12 people under his command and their duty was to recruit people for the military or report them to the office of [REDACTED] if they refused to join the military at which point [REDACTED] would send a group to arrest those who refused to join the military. The write-up of the June 19, 2003 interview also indicated that the applicant stated that his orders were to arrest three people every week and that although he did not follow those orders, his unit did arrest and interrogate people before surrendering them to the head office. According to the write-up, the applicant also stated that he had never engaged in battle and he used a rifle for target shooting only. The asylum officer concluded in the write-up that it seemed unlikely that the applicant who served six years in a conflictive area ([REDACTED])

where [REDACTED] departments) did not engage in battles. The asylum officer also concluded in the write-up that the applicant was not credible with respect to his inconsistent and vague testimony denying knowledge of human rights abuses as the applicant was in areas where human rights abuses took place.

In a February 13, 2008 interview with an asylum officer in conjunction with his asylum application, the applicant stated that he had been to the United States three times, in 1977 and had been deported, had entered again in 1978 to 1982, and again from January 1990 to 2003. In response to being asked if he had been in the Salvadoran military, the applicant indicated he had been in the civil patrol. The applicant also stated that he had not harmed anyone.

In a February 27, 2009 notice of intent to deny (NOID), the asylum office director notified the applicant that regarding his asylum claim, he had “presented testimony that was believable, consistent, and sufficiently detailed” and thus was found credible. The asylum office director noted, however, that the applicant had not presented evidence of eligibility for asylum and further observed that based on the applicant’s experience with the civil patrol, the applicant may possibly be barred from obtaining asylum under 8 C.F.R. 208.13(c)(2)(i)(E) as someone who “ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.”

In the applicant’s March 6, 2008 rebuttal to the asylum office director’s NOID, the applicant through counsel noted the asylum office director’s finding that the applicant was credible and asserted that the credible and consistent version of the facts supported the applicant’s statements that he was assigned to the civil patrol of [REDACTED] around 1987 to locate potential conscripts between the ages of 18 to 30 and ascertain whether or not they had complied with the selective service laws of El Salvador and that if the potential conscripts were non-compliant, the civil patrol would detain the individual and transport him to the military headquarters at [REDACTED] for processing and enrollment. Prior counsel contended that enforcement of Salvadoran selective service laws should not be viewed as forced recruitment arising to the level of someone who “ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.”

In a subsequent interview, dated October 6, 2008, the applicant stated that he was a commander in the civil patrol in 1987 and prior to that had been a member of the civil patrol in 1985, 1986, and 1987. The applicant stated that his responsibility in the civil patrol was to take care of the community and when a citizen had to report to the military, he had to get them to the proper place. The applicant reiterated that he had never harmed anyone.

The record further included photocopies of the applicant’s army identification. One photocopy shows the applicant’s picture in the left hand bottom corner of the identification with a seal covering a small portion of the applicant’s picture. The photocopy shows the identification card was valid June 30, 1987 and identifies the applicant as a first commander. A second photocopy of the army identification card includes images of both the front and the back of the card. This

iteration of the identification card shows the applicant's picture and seal in the center to left bottom of the identification card. The applicant's picture is inside the seal. The images on the cards are clearly different and raise questions regarding the authenticity of the card. When asked about the inconsistent images, the applicant indicated he no longer had the card and did not know why his photograph on the card appeared in two different places.

As observed above, the field office director found that the applicant's statements in the June 19, 2003 asylum interview were not credible, specifically that the applicant in his sworn testimony denied knowledge of any human rights violations committed by the civil patrol during his six-year tenure. The field office director found this specific denial far outweighed the positive factors presented by the applicant and did not warrant a favorable exercise of discretion.

In response to the certification notice, counsel for the applicant correctly pointed out that the Newark Asylum Office in the February 27, 2008 NOID, notified the applicant that he had "presented testimony that was believable, consistent, and sufficiently detailed" and thus was found credible. Counsel noted that the April 29, 2008 decision denying the applicant's asylum claim was based on a conclusion that the applicant had not presented evidence establishing a well-founded fear of persecution, not on the applicant's lack of credibility. Counsel asserted that the credibility determination made by the Newark Asylum Office as set forth in the February 27, 2008 NOID should have been given great deference by the field office director when considering whether to exercise discretion favorably on behalf of the applicant. Counsel cited *Jishiashvili v Attorney General of the United States*, 402 F. 3<sup>rd</sup> 386 (U.S. Court of Appeals, 3<sup>rd</sup> Circuit 2005), a decision wherein the court recognized that an immigration judge's evaluation of an applicant should be given great deference by the appellate court because the immigration judge had opportunity to observe the applicant as he gives his testimony. Counsel also reiterated that it is not persecutory for a country to require military service of its citizens and that the field office director improperly imputed impermissible conduct by the applicant based on unidentified Department of State reports.

On certification, the AAO found that the asylum officer's contemporaneous write-up of the June 19, 2003 interview reflects the most accurate finding of the Newark Asylum Office regarding the applicant's credibility. The AAO also found that the applicant's submission of an obviously altered identification card regarding his tenure in the Salvadoran civil patrol impugns the applicant's credibility. The information in the record is insufficient to support a finding that the applicant's actions in El Salvador between 1982 and 1990 involved the persecution of others; however, the applicant's generally vague testimony regarding his activities with the civil patrol and the events occurring in El Salvador when he was there, the applicant's willingness to include information on a Form I-589 that was untrue in an effort to obtain asylum, and the submission of an altered document raises significant questions regarding the veracity of the applicant.

In the AAO's May 5, 2010 decision affirming the field office director's denial of the Form I-485, the AAO noted that the field office director found the applicant's statements in his Form I-589 June 19, 2003 interview were not credible and that the applicant's lack of credibility is such a

significant negative factor that the applicant is precluded from adjusting his status. Over the course of his interviews, the applicant gave conflicting accounts regarding the length of his service, and of the nature of his activities in the civil patrol.

In a November 25, 2011 notice of intent to deny (NOID) the director informed the applicant that he is not eligible for TPS under section 208(b)(2)(A)(i) of the Immigration and Nationality Act (“an alien who ordered, incited, assisted, or otherwise participated in the persecution of others on account of race, religion, nationality, membership in a particular social group, or political opinion).” The director noted that the applicant indicated on his Form I-821, that he had served in, been a member of, or participated in a military unit, paramilitary unit, police unit, self-defense unit, vigilante unit, rebel group, guerilla group, militia, or insurgent organization. The director requested that the applicant submit evidence of his membership and details of his involvement in any such unit, group, or organization.

In his response, counsel for the applicant asserted that there is “no prima facie evidence or recorded document of proof ever submitted by the government to substantiate [the government’s] position” that the applicant committed human rights violations.

In the March 18, 2013 denial notice, the director stated that there remained inconsistency in the applicant’s testimony about his military service in El Salvador, and that it has not been established, in the applicant’s testimony and in the collective documents, that the applicant was not a participant and that he was not unaware of such violations, even though he claims that he had not participated in the violations.

On appeal, counsel reasserts that the burden is on the government to prove that the applicant committed human rights violations.

Contrary to counsel’s assertion, if the evidence indicates that the persecutor bar applies to the applicant, the *applicant* bears the burden of proving by a preponderance of the evidence that he or she did not order, incite, assist or otherwise participate in the persecution of any person on account of a statutorily protected ground. 8 C.F.R. § 1208.13(c)(2)(ii) (2008).

We find that the record contains evidence sufficient to trigger the applicant’s burden, and we agree with the director that the applicant did not meet his burden. The record contains substantial evidence supporting the adverse credibility finding.<sup>2</sup> Upon *de novo* review of the entire record, we deem the applicant ineligible for TPS because he was unable to meet his burden of proof to show that the persecutor bar to relief under TPS does not apply. The applicant’s admitted participation in the civil patrol, coupled with the evidence of human rights violations that occurred during the time and in the place that applicant patrolled, was sufficient to trigger

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<sup>2</sup> We note that the record contains no evidence that calls into question the applicant’s capacity to testify truthfully or to recall past events. Thus, any such unsupported argument would fail.

Based on the evidence of record – the applicant’s own sworn testimony and country condition information, the applicant falls within the group of aliens described in sections 208(b)(2)(A) of the Act. He is ineligible to receive TPS in the United States. The applicant failed to establish by a preponderance of the evidence that the persecutor bar does not apply to him.

An alien applying for temporary protected status has the burden of proving that he or she meets the requirements enumerated above and is otherwise eligible under the provisions of section 244 of the Act. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has failed to meet this burden.

**ORDER:** The appeal is dismissed.